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# State of Utah, By and Through its Road Commission v. Rowland S. Bingham and Katherine C. Bingham, his Wife, et al. : Plaintiff-Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, by and through  
its ROAD COMMISSION,

*Plaintiff-Appellant,*

vs.

ROWLAND S. BINGHAM and  
KATHERINE C. BINGHAM,  
his wife, et al.,

*Defendants-Respondents.*

Civil No.

~~41128~~

10831

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## PLAINTIFF-APPELLANT'S BRIEF

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Appeal from the District Court of Weber County  
State of Utah  
Parley E. Norseth, Judge

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# IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH, by and through  
its ROAD COMMISSION.

*Plaintiff-Appellant.*

vs.

Civil No.  
41128

HOWLAND S. BINGHAM and  
KATHERINE C. BINGHAM,  
his wife, et al.,

*Defendants-Respondents.*

---

## PLAINTIFF-APPELLANT'S BRIEF

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### NATURE OF THE CASE

In a condemnation action, the State asserts that the defendants Bingham are not entitled to recover severance damages on the theory of diminution of value of remaining land until they establish by a preponderance of the evidence that they exercised reasonable care, diligence and prudence in attempting to alleviate the alleged landlocked condition of the tract and to acquire suitable access from adjacent landowners, and that such reasonable effort was unsuccessful.

## DISPOSITION IN LOWER COURT

The lower court entered a judgment against the State on a verdict awarding severance damage to the defendants in the sum of \$17,281.00. The court overruled the State's objections to certain evidence, denied the State's motions at the conclusion of the evidence, and denied a requested State instruction raising the legal issue involved in the case.

## RELIEF SOUGHT ON APPEAL

Plaintiff-appellant asks this court to reverse the determination made by the trial court and to reduce the judgment by the amount of the severance damage awarded, or in the alternative, to award a new trial on the issue of severance damage.

## STATEMENT OF FACTS

Defendants Bingham owned a tract of land in the Riverdale area, Weber County, part of which was condemned by the State of Utah as an incident of the construction of the north-south freeway. A sketch of the tract of land with respect to adjacent property is attached for convenience as Appendix A. A condemnation proceeding resulted in a tract of approximately 6.4 acres being separated from the area of the original Bingham tract upon which was located the house and certain other buildings. The 6.4 acre tract was bounded on the west by the new Interstate High-

way and on the South by U. S. Highway 89. The property on the north was owned by the defendant's brother, Ezra Bingham; on the east side of the tract a piece of land in the shape of a triangle separated the tract in question, except for approximately 19 feet, from a county road and was owned by Hank Dee. It is conceded that the defendants Bingham could not reasonably obtain access to the tract from the west or the south. Appellant claims that the said defendants did not produce any evidence which would reasonably justify the inference that suitable access could not have been obtained from either the north or the east. Appellant claims that defendants should, therefore, be denied severance damage.

Mr. Bingham testified that he acquired his property from his father and that his brothers Ezra and Golden had acquired their respective tracts from their father (T. 29). The property owned by the three brothers constituted their father's farm and was operated by the family. The three Bingham brothers worked together on the farm in the development of the property (id). About the time the State brought an action to condemn the property, Roland Bingham was aware of the fact that other subdivisions were being developed in the Riverdale area and he and his brothers had engaged in discussions and had made plans for the development of their properties as a unit (T. 30). Roland actually prepared tentative plats in connection with a proposed subdivision and there were discussions with Golden and Ezra concern-

ing the subdivision project (ibid). When the representatives of the State Highway Department first talked with Mr. Bingham about the acquisition of his property, Rowland showed one or more of the plats to the representatives (ibid 31). There never has been a fence between the property owned by Rowland and Ezra Bingham (T. 33). The irrigation facilities serving the two tracts have never been changed and are used on a joint basis by Ezra and Rowland (T. 33-34).

The defendant Rowland Bingham testified that after the condemnation suit was filed, his wife had some arguments with Ezra's wife and that the family relationships had become strained (T. 25-26). Ezra was not called as a witness, nor was Rowland's wife. Rowland testified, however, that Ezra had refused to sell him a right-of-way over the south end of his property to give Rowland access to the street but that Ezra had offered to sell the defendants all of his property (T. 26). Rowland testified that Ezra told him several times that he would have to buy all of his property (T. 40). He did not testify as to the price at which the property was offered or whether the price was greater than the price which Rowland put upon his own property.

Rowland admitted that he had never approached Hank Dee in an effort to acquire the piece between the west line of the tract in question and the county road (T. 35-36). He admitted that there was no use being made of the property between a retaining wall



on the Dee property and the 6.4 acres upon which severance damages were awarded (T. 37-38).

When the testimony of the first expert called by the defendants Bingham was offered with respect to the severance damage on the 6.4 acres involved, the State objected on the ground that it was based upon an assumption of fact not established by the evidence (T. 54). The State's objection was overruled. At the conclusion of the defendant's evidence, the State moved for an order dismissing the claim of the defendants for severance damage on the ground that defendants failed to establish by a preponderance of the evidence that they made any reasonable effort to obtain access rights to the acreage to which severance damage was claimed (T. 141). The State requested an instruction to the effect that the Binghams were not entitled to recover severance damages on the same ground and on the further ground that the evidence affirmatively disclosed that the defendants could have purchased adjacent land to the north whereby the landlocked condition would have been corrected (T. 142). Alternatively, the State asked the court for an instruction to the effect "that before the defendant landowners can acquire severance damages to the 6.44 acres they must satisfy the jury by a preponderance of the evidence that they have exercised reasonable care, diligence and prudence in attempting to alleviate the alleged landlocked condition of that tract of land . . ." (T. 142). All of the State's objections, motions and requests for instruction on the point were denied and overruled.

## ARGUMENT

### POINT I.

**THE COURT ERRED IN PERMITTING THE DEFENDANTS BINGHAM TO RECOVER SEVERANCE DAMAGES.**

### POINT II.

**THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT SEVERANCE DAMAGES COULD NOT BE RECOVERED UNLESS THE LANDOWNERS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT THEY EXERCISED REASONABLE CARE AND PRUDENCE IN ATTEMPTING TO ALLEVIATE THE CONDITION OUT OF WHICH SEVERANCE DAMAGES PURPORTEDLY AROSE.**

The legal propositions were presented in different ways during the trial of the case, but the proposition contended for on appeal involved a single question of law, to-wit: Whether a landowner must exercise reasonable care and prudence to acquire access to highways or otherwise alleviate the landlocked condition before he is entitled to recover severance damages. The State suggests that it is apparent in the instant case that as soon as the defendants are paid the amount of the judgment finally awarded to them, they will be in a position to complete plans with brother Ezra so that the tract of land in question can be developed with Ezra's property for subdivision purposes. The expert witnesses all testified as to the value of the land as a subdivision and there is no dispute to the propo-

sition that if access was available they would have no severance damage. The State suggests that under these circumstances, before Rowland Bingham and his wife are entitled to recover severance damages they had a duty to exercise the care and prudence of reasonable and prudent landowners who would be interested in making the highest and most productive use of their property to acquire such access as would enable them to develop it as prudent persons. Only when they produce reasonable and believable evidence that such efforts have been fruitless, that is to say, that they have not been able to acquire reasonable access, should they be entitled to an award of severance damage on the theory that the property cannot be put to the same use as was available to it before the condemnation proceedings occurred.

Utah authorities hold uniformly that one whose property has been condemned has the burden of proving both the amount of compensation required for the land taken, *State v. Petersen*, (1961), 12 Ut. 2d 317, 366 P. 2d 76, *State v. Noble*, (1959), 8 Ut. 2d 405, 335 P. 2d 831, (1957) 6 Ut. 2d 40, 305 P. 2d 495, *State v. Tedesco* (1956) 4 Ut. 2d 248, 291 P. 2d 1028, and the amount of compensation required to compensate for claimed severance damages, *Utah Road Commission v. Hansen*, (1963) 14 Ut. 2d 305, 383 P. 2d 917, *State v. Petersen*, (1961) 12 Ut. 2d 317, 366 P.2d 76, *Tanner v. Canal & Irrigation Co.*, (1911) 40 Ut. 105, 121 Pac. 584, aff'd 239 U.S. 323, 60 L. Ed. 307, 36 S.Ct. 101. The principle was applied by Mr. Justice

Crockett in *Utah Road Commission v. Hansen*, supra, where he referred to the trial procedure as follows:

"The right to acquire the property by condemnation was not questioned. The trial went forward with the defendants in effect as plaintiffs with the burden of establishing their damages." 14 Ut. 2d at 306-07.

To meet his burden the landowner must first prove that he is entitled to compensation, and then he must prove the amount which will reasonably compensate him. *Tanner v. Canal & Irrigation Co.*, supra, cf. *Utah Road Commission v. Hansen*, supra. Once a landowner has established that he is entitled to damages, the measure of those damages is governed by the rule enunciated by this court in *State v. Peterson*, (1961), 12 Ut. 2d, 317, 366 P.2d 76, as:

" . . . the correct measure of damages: for the land actually taken: the fair cash market value on the date of the condemnation; and for severance damages to the remainder: the difference between its fair cash market value before and after the taking." 12 Ut. 2d at 321.

This rule is the general one both for measuring compensation for the land taken and for measuring severance damages. *McCormick on Damages*, West Publishing Co., pp. 528-29, *Salt Lake County Cottonwood Sanitary District v. Toone*, (1960) 11 Ut. 2d 232, 357 P.2d 486, *State v. Coop. Sec. Corp. of Ch. of Latter Day Sts.*, (1952) 122 Ut. 134, 247 P.2d 269, *State v. Ward*, (1948) 112 Ut. 452, 189 P.2d 113, *Prom-*

*River Water Users' Ass'n. v. Carlson*, (1943) 103 Ut. 95, 133 P.2d 777. However, before the landowner may introduce evidence relating to the amount of severance damage he must first meet the burden of proving that he is entitled to this kind of damage. The State suggests that the trial court failed to apply this rule.

There is no question that the landowner in the instant case is entitled to damages such as will compensate him for the land condemned. Applying the rule enunciated above, for the land taken he is entitled to its fair cash value on the date he received his notice of condemnation. See also Sec. 78-36-11, U.C.A., 1953. The jury made an award based upon conflicting evidence, and no point is made here that they could not have made their finding upon this phase of the case.

On the other hand, the landowner in the instant case failed to meet the legal requirements and burden of proof required to establish his right to severance damages in addition to compensatory damages. To establish a right to severance damages, a landowner must show that the condemnation has caused a decline in market value to the remaining part of his land which exceeds the value of the land actually taken. *State v. Coop. Sec. Corp. of Ch. of Latter Day Sts.*, supra, *Provo River Water Users' Assn. v. Carlson*, supra; then he must establish his right to be compensated for this damage.

After the landowner proves he has been injured

by a decline in the value of his remaining land which exceeds the value of the land taken, he also has the burden imposed upon him by the doctrine of avoidance consequences:

“Where one person has committed a tort or breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.” McCormick, *supra*, P. 127. (Emphasis added)

As applied to severance damage, the principle is that the landowner must show that he has attempted to minimize his damage.

In *State v. Coop. Sec. Corp. of Ch. of Latter Day Saints.*, *supra*, this court, applying the doctrine of avoidable consequences, refused to allow severance damage to a landowner who, although he had shown a decline in value greater than the land taken, had failed to attempt to minimize damages stating:

“If similar land to that taken was available on the date the summons was served, which could have been substituted for that condemned, it cannot be contended that the entire project was depreciated in value because it was made economically unfeasible because of lack of pasture land to graze a minimum number of dairy cattle.” 122 Ut. at 139.

It was also held that where the landowner has failed to show that he has attempted to minimize his damage

the expert opinion which the landowner offered to show the proper measure of severance damages was inadmissible, because no right to them had yet been established. Applying the rules of this case to the instant case, it is clear that the trial court erred in its overruling of the appellant's objections to respondent's expert testimony regarding the measure of severance damages, its refusal to hold as a matter of law that the respondent had failed to establish a right to severance damages, and its submitting to the jury the question of severance damages. All these errors result from the failure to apply the *Cooperative Security* case principle to the facts of the instant case.

It should be noted that although the case of *State v. Coop. Sec. Corp. of Ch. of Latter Day Sts.*, supra, reaffirmed by the court 1 Ut.2d 178, 264 P.2d 281 (1953), is the leading case in this area, it is not the only Utah authority in point. In *Provo River Water Users' Ass'n v. Carlson*, (1943) 103 Ut. 93, 133 P.2d 777, this court held that one claiming severance damages had the affirmative duty of proving no other suitable land was available to replace that taken. In fact the following language from this case was quoted in *State v. Coop. Sec. Corp. of Ch. of Latter Day Sts.*, 122 Ut. at 138-39, in reaffirming this principle:

"The purchase price of a tract of land which produces the same relative results Carlson obtained from the pasture tract prior to condemnation, offsetting the advantages against the disadvantages, would be the controlling factor

in the determination of market value of the pasture condemned, whether a greater or lesser acreage would be required, due consideration being given to type and amount of feed produced, water available, and the location of the land with respect to other properties owned by Carlson. *If he could purchase other pasture land or farm land convertible into pasture, within a distance from his barns comparable to that of the condemned tract, and such other land would provide relatively the same kind of forage for the same number of cows or forage of equal ration-value throughout the seven months he used the wild pasture tract, it could not be contended that his properties in Charleston could be impaired or depreciated by taking the pasture. If another tract of equal forage-producing value and conveniences could be substituted for the tract condemned, whether larger or smaller in area, the defendant would be in relatively the same position he was in before the construction of the reservoir. (citations omitted)*" 103 U. 102-103. (Emphasis added).

In the instant case it is undisputed that the claimant's brother, Ezra, owns the land to the north. The evidence was that Ezra offered to sell this land to defendant. The defendants admitted that they had not attempted to obtain land to the east, although there was one strip not being used by its owner. These circumstances require the denial of severance damages as a matter of law. This is not a case like *Southern Pacific v. Arthur*, (1960) 10 Ut. 2d 306, 352 P. 2d 693, where this court affirmed a severance damage because the unique nature of the land taken prevented



any replacement. There was nothing unique about the land taken here. That the land-lock condition was cureable was shown by the defendants' own evidence. At least, the trial judge refused to submit to the jury whether the defendants had acted reasonably, and in good faith, in attempting to cure the condition; the trial judge refused to instruct that defendants must make a reasonable effort in this respect before severance damage was recoverable.

## CONCLUSION

The error of the trial court in allowing the respondent to recover severance damages despite the failure of the respondents to establish their right to them requires reversal of the trial court's judgment awarding severance damages.

**RESPECTFULLY SUBMITTED** this 21st day  
of April, 1967.

**PHIL L. HANSEN**  
Attorney General

and

**GEORGE M. McMILLAN**  
Special Asst. Attorney General  
State of Utah

APPENDIX A

Illustrative only, not exactly to scale.

